Mohammed Sulaiman Sahulhameed v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPLICATION NO Q-05–188–07 OF 2012
MOHAMAD ARIFF, ROHANA YUSUF AND HAMID SULTAN JJCA
3 SEPTEMBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for offence of trafficking in dangerous drugs and sentenced to death — Accused person caught with drugs at airport — Non-adherence to 'Alcontara direction' — Whether conviction and sentence safe — Dangerous Drugs Act 1952 s 39B(1)(a)

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The appellant, an Indian national, was convicted and sentenced for the offence of trafficking in 5,796g of ketamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant had arrived by flight from Delhi to Kuala Lumpur on 16 March 2009. On 17 March 2009 he had arrived in Kuching Airport. The custom officer, having observed that he had taken a box from the conveyor belt, proceeded to examine the box. A TV set was found and it was not functioning and upon further examination they found drugs cleverly concealed. In the present appeal, the appellant's contention was related to non-adherence to '*Alcontara* direction' as well as the miscarriage of justice which had occurred when the trial judge did not believe that there are two airports in Delhi under the name of Indira Gandhi Airport. One was the international airport and the other was the domestic airport. It was argued that it would take some reasonable time to travel to both airports by car and it was not one which was in the same building.

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Held, allowing the appeal and setting aside the conviction and sentence:

(1) The defence version though put to the prosecution at the earliest opportunity was not rebutted or verified by the prosecution even though they had ample opportunity to do so. Even the investigation officer recommendation to verify was turned down by superior officers from the head office. The failure to verify and/or rebut the defence story will amount to breach of '*Alcontara* direction' (see para 13(c)).

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(2) The hallmark in writing judgments necessarily requires the court to consider the defence version in the right perspective and make sure '*Alcontara* direction' as well as *Radhi*'s direction are meticulously dealt with, failing which the appellate court may rule that it was not safe to convict. The prosecution had not taken the initiative to rebut the defence story and in consequence it was unsafe to convict (see para 13(d) & 14).

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[Bahasa Malaysia summary

Perayu, warganegara India, disabitkan dan dihukum untuk kesalahan mengedar dadah ketamine sebanyak 5,796g, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu telah tiba dengan penerbangan dari Delhi ke Kuala Lumpur pada 16 Mac 2009. Pada 17 Mac 2009 dia tiba di Lapangan Terbang Kuching. Pegawai kastam, setelah memerhati yang dia telah mengambil kotak daripada tali sawat penyampai, meneruskan untuk memeriksa kotak tersebut. Set TV ditemui dan ia tidak berfungsi dan atas pemeriksaan selanjutnya mereka mendapati dadah disembunyikan dengan bijak. Dalam rayuan ini, hujahan perayu adalah berkaitan kepada ketidakpatuhan kepada '*Alcontara* direction' dan juga ketidakadilan yang terjadi apabila hakim bicara tidak mempercayai bahawa terdapat dua lapangan terbang di Delhi di bawah nama Indira Gandhi Airport. Satu adalah lapangan terbang antarabangsa dan yang lagi satu adalah lapangan terbang domestik. Ia dihujahkan bahawa ia akan mengambil masa yang munasabah bagi perjalanan ke kedua-dua lapangan terbang dengan kereta dan ia tidak terletak dalam bangunan yang sama.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Versi pembelaan walaupun diberikan kepada pihak pendakwaan pada peluang paling awal tidak dipatahkan atau disahkan oleh pihak pendakwaan walaupun mereka mempunyai peluang yang lebih daripada cukup untuk berbuat sedemikian. Cadangan pegawai penyiasat untuk mengesahkan juga ditolak oleh pegawai atasan dari ibu pejabat besar. Kegagalan untuk mengesahkan dan/atau mematahkan keterangan pembelaan akan menjumlahkan kepada kemungkiran '*Alcontara* direction' (lihat perenggan 13(c)).

(2) Ciri-ciri dalam menulis penghakiman memerlukan mahakmah untuk mempertimbangkan versi pembelaan dalam perspektif yang betul dan memastikan '*Alcontara* direction' dan juga prinsip *Radhi* diurus dengan teliti, jika gagal mahkamah rayuan boleh memerintahkan bahawa ia tidak selamat untuk menyabitkan. Pihak pendakwaan tidak mengambil inisiatif untuk mematahkan keterangan pembelaan dan akibatya adalah tidak selamat untuk menyabitkan (lihat perenggan 13(d) & 14).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (folld)
Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

Appeal from: Criminal Trial No 45–8 of 2009–II (High Court, Kuching)

CM Sundram (CM Sundram & Co) for the appellant.
Muslih bin Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA:

[1] The appellant's appeal against conviction and sentence of death came up for hearing on 16 April 2014 and upon hearing the submission we allowed the appeal. My learned brother Mohamad Ariff bin Md Yusof JCA and my learned sister Rohana bt Yusuf JCA have read the draft judgment and approved the same. This is our judgment.

PRELIMINARIES

[2] What is important to note in this case was that the prosecution had not adhered to '*Alcontara* direction' or taken steps to rebut the appellant's version which in law and on the facts of the case is fatal to the prosecution to prove the case beyond reasonable doubt at the prosecution stage as well as defence stage. This is what the investigation officer PW12 had to say:

Q: Did you at any time during the entire investigation try to verify with your Indian counterparts as to the link between Exh. P44 and Exh. P29, try to contact them?

A: Yes, during the course of my investigation, I wrote to our Headquarters in Putrajaya to seek assistance under MACMA 2002 but my Headquarters did not agree with my opinion. I refer to both exhibits, Exh. P44 and Exh. P29.

Q: Do you agree by looking at Exh. P24(a) & (b). Can you see in this letter the mention when the date of the test was done?

A: Not mentioned.

[3] The appellant's amended charged, inter alia, reads as follows:

> That you, on the 17.3.2009 at about 1015hrs, at the arrival hall of the Kuching International Airport, Kuching, in the State of Sarawak, did traffic in dangerous drug, to wit a total of 5,796 grams of Ketamine, which is listed in the First Schedule of the Dangerous Drugs Act 1952 (Act 234) without any authorization and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under section 39B(2) of the same Act.

[4] The appellant's petition of appeal, inter alia, reads as follows:

The First Ground:

1. The Learned Judge had erred in law when she misdirected herself on the issue of knowledge and possession after she had herself stated at page 7 of the Record of Appeal [Volume 1] that:

> Section 39(da) is not a Section which creates an offence. It is a presumption section for the offence of trafficking. Since Ketamine is not provided in that section, the person cannot rely on that section and they must prove trafficking by direct or circumstantial evidence. It makes the prosecution's job harder but not legally impossible as submitted by Defence Counsel. (Emphasis added.)

1. After maximum evaluation, the Court had acquitted and discharged the Appellant.

1.1. However, after the Court of Appeal had only given an instruction that the Appellant 'needs to explain', Her ladyship, [becoming aware of such an instruction after being told by Defence Counsel in his submission], now states at page 1 line 25 as follows: 'with hindsight, I realised the error of my earlier decision in not calling for the Defence because the facts in the prosecution's case plainly support the invocation of the presumption on possession and knowledge under section 37(d) of the DDA 1950 as explained by the Federal Court in *Muhammad Hassan v Public Prosecutor* [1991] 3 CLJ 170. I did not in my earlier decision discuss the other essential elements of trafficking on account of the erroneous finding I made on that of possession and knowledge'.

1.2. She further states at line 5 in page 2 of the Judgment, 'I would do it now without going into the details of the accused's evidence in Defence because the said evidence in no way impact this element — only that of possession'.

1.3 This misdirection on the learned Judge's subsequent decision in convicting and sentencing the appellant after an earlier maximum evaluation based upon the prosecution's case where she had acquitted and discharged the Appellant has occasioned a miscarriage of justice.

Second Ground:

The Learned Trial Judge had erred in law and fact by making a subsequent ruling that there is a prima facie case against the Appellant when such finding goes against the weight of evidence.

Third Ground:

3. The Learned Trial Judge had erred in law and fact in making a ruling that the prosecution had proven its case beyond reasonable doubt and had convicted the Appellant when the conviction was against the weight of evidence based upon the Court's 're-evaluation' after having carried out a maximum evaluation in the first instance.

Fourth Ground:

4. The Learned Trial Judge had not considered the defence at all and or alternatively erred in law and in fact in convicting the Appellant when detailed examination of the evidence had earlier showed otherwise. She emphasized that following the ratio in the cases of *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 and *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 the Appellant, as a matter

of common sense, since the weight of the offending drug was 5796 grams, it naturally follows that it was not meant for his consumption.

4.1. The Defence had never at any stage raised this as an issue. Her Ladyship agrees to this at line 21 at page 3 of her judgment. Furthermore, the Appellant had clearly testified during defence stage that he never drinks, smokes and definitely does not consume drugs.

4.2. Her ladyship states at, page 3 line 22 of her judgment as follows: 'the sole inference raised from the concealment of the large quantity of drugs found is that it was meant to be for the use of others was therefore unrebutted and the defence raised by the accused, just in *Abdul Manaf*'s case (supra), that he was 'a passive carrier' must be rejected'.

4.3. Her ladyship quoted Lord Diplock's Judgment in *Ong Ah Chuan* that 'thus in the case of an accused was caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely needed for his consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him (Emphasis added), be irresistible — even if there were no statutory presumption such as is contained in section 15 of the Drugs Act'.

4.4. However, here, Her Ladyship had departed from what was intended by Lord Diplock when he stated about 'any plausible explanation' by the accused.

4.5. The Appellant had clearly stated that he had no knowledge of what was contained within the TV set. This is explained, later, below. Now, how could the Appellant transport drugs when he only knew what was offered to him to bring into Malaysia was just a TV set. The Appellant cannot possess what he does not know he is possessing.

4.6. Although Her Ladyship states that the Appellant had contradicted in his exculpatory cautioned statements and his testimony in Court in that the first contradiction was that he was asked to bring the TV set by Gajamuddin to Kuching because the said set was faulty and needed repairs. It was Gajamuddin's instruction to the Appellant that the TV set had to be sent to Kuching because it was bought in Kuching. The Appellant never said that the set was bought in Kuching but only repeated what was told to him. The purchase bill which the Appellant had faithfully carried with him and had given to the Customs Officers when they wanted to search him does confirm that the set was purchased by the perpetrator of the crime, Gajamuddin in Chennai, transported to New Delhi and then passed on to the Appellant when he arrived by flight from Chennai on 16th March 2009. This is clearly explained below.

4.7. The Appellant had never stopped saying that he was looking for work, He was coaxed into coming to Kuching using his own money the first time to be employed locally. The second time around, to transport sarees [fare paid by Gajamuddin aka Syed]. It was during the third occasion when the Appellant, still looking for money was fixed up by the said Gajamuddin when the drugs were concealed and given to him to transport to Kuching.

4.8. The Appellant therefore had no knowledge of what was contained in the said TV set. The purported 'contradictions' were therefore not contradictions. When Gajamuddin asked him to go to Kuching on all the three occasions, in the mind of

the Appellant, what he was doing was working. The Court should take into account that he only had preschool education [stated in his testimony]. This uneducated auto-rickshaw driver is unable to read and write even Tamil well let alone English. Hence the Court cannot call him a fool because he is uneducated.

Fifth Ground:

5. The Learned Judge had erred in law and fact in making and drawing wrong inferences against the Appellant in which in the event of doubt, it should be resolved in favour of the accused. The inference against him are also explained above and below this paragraph. The Appellant never possessed the drugs as he had no knowledge of what he was 'possessing'. A person cannot be said to possess a thing if he did not know what he possessed.

The Sixth Ground:

6. The Learned Trial Judge had erred in that Her Ladyship had not taken the following salient points in favour of the accused in respect of Exhibit P31:

(a) That, contrary to what is stated between lines 5–10 at page I of the Judgment, that the accused had lied about the two airports, it is apparent that the Court's finding is not based upon even an iota of evidence subscribed by the prosecution in Court that the two terminals were in the same airport i.e. 'Indira Ghandi International Airport'.

(b) The Appellant had testified on oath that Terminal 1 is quite a distance from Terminal 2 and that it did take him some time to reach Terminal 2 by cab on that particular day because of heavy traffic. The fact that he is accused of an offence does not negate his credibility respecting his testimony since that can only be negated by counter evidence. The Court's conclusion that the Appellant is a lier is therefore erroneous in that it should have let the prosecution provide witnesses and evidence that the two terminals are located within the same airport. This was not done. Further, Exhibit P31 which was seized by the prosecution gave it the benefit of calling appropriate witnesses to the stand at its stage to state so.

The Seventh Ground: [Appellant's visits to Kuching, Sarawak]:

7. The Learned Trial Judge had erred in stating that the Appellant's story is to be disbelieved because the three trips were explained by PW 5, Puan Roziah Binti Taiban.

7.1.1 There was absolutely no objection by the Defence to the tendering of all the exhibits by this witness to the Court. Therefore, the Court should not infer negatively against the Appellant.

7.1.7 The Appellant's narration of his Life in India went only as far as it was necessary to explain the dire circumstances and the reason why he borrowed Indian Rupees 70,000.00 [not RM70,000.00 as stated in the Judgment] to enable him to look for work in Malaysia. The crafty drug-lords of the Indian Sub-Continent saw opportunity in the Appellant and had tricked him into coming to Malaysia under the pretext of providing work but on the third trip, fixed him up by asking him to mute the loaded TV set after it was already fitted and sealed.

The Eight Ground:

8. The Trial Judge had erred in not believing the Appellant's Defence and had formed her own opinion/assumptions to enable her to convict him even though it was not supported by evidence beyond reasonable doubt. The Appellant never had any knowledge of what he 'possessed'.

8.1. If it was so obvious that the Appellant had trafficked the drugs, the Trial Court would have been able to formulate an opinion of disbelief in the first instance itself because all the defence was introduced during the Prosecution's case.

8.2. Herein lies the afterthought of the Honourable Court in convicting the Appellant because the Court of Appeal had 'asked him to explain' without even being provided with the Notes of Proceedings/findings and or rulings of that Court. Therefore, the decision in *Ouseng Sama -Ae v Public Prosecutor* [2010] 6 CLJ 416 does not aid Her Ladyship because the circumstances were such that she was not provided material sufficient that she 'must now have due regard to the findings and rulings of the Court of Appeal as if those findings and rulings had been made by the trial judge himself at the close of the case for the prosecution ...'.

Ninth Ground

9. The Learned Judge had erred in her Judgement when she quoted the case of *Hock Leong v Public Prosecutor* [2008] 4 CLJ 765, that the Appellant had indeed taken effort to conceal the drugs to avoid detection. This was because, the TV set was indeed handed to the Appellant at Indira Gandhi Int'l Airport at New Delhi. He flew from Chennai without the offending exhibit. He landed at Terminal 1 and upon arrival, he met with Gajamuddin who had already secure wrapped the set by 8: 46 p.m. [Exhibit P44I and handed the same to him to carry to Malaysia at 11: 10 p.m. as evidenced by Exhibit P32. He never had an opportunity to see eyen the actual TV set save only the secure wrapped cardboard box carrying the name 'Samsung' with a picture of a TV set.

9.1. The Appellant had indeed no knowledge of what the contents were within the TV set and common sense would dictate that in order to conceal the drugs in the manner they were concealed so painstakingly, it would take a considerable period of time and this could not have been made within the short span of time afforded to the Appellant from the time he landed at Terminal 1.

9.2. On this fact alone, the Appellant deserves to be acquitted and discharged of the charge levied against him.

Tenth Ground:

10. The Learned Trial Judge had erred in ruling that the possession of the receipt for the services of the wrapping shows the probability that the Appellant was the one who had engaged the service provider himself. This is rebutted at ground 9 above that the receipt was handed to the Appellant by Gajamuddin at the airport. Her Ladyship even goes to the extent that she does not think Gajamuddin is a fictitious character at page 5 line 22 under (i).

10.1. With that, one can with a certain amount of certainty, conclude that the Appellant had no knowledge of the contents of the drugs within the TV set.

10.2. The Appellant was to meet the person to whom the TV set was to be given but as stated in Her Ladyship's judgment, the cell-phone through which the said person was to collect it from the Appellant was not communicable because the Customs

Officers had switched off the phone. An attempt to clarify this failed because the Prosecution had failed to get the battery charged despite a request put to them verbally a day before. Had the phone been activated, it is probable that the identity of the caller would have been confirmed to tally the Appellant's story.

10.3. Even better, if the Customs Officers had utilized their brains, that person could have been caught and the Appellant cleared of the charge.

10.4. The Learned Trial Judge had erred when she did not address all the above and went against her own finding of acquittal and discharge to choose one of conviction and the imposing of the mandatory death sentence merely because the Appellate Court had asked for an explanation from the Appellant — a plausible explanation which the Appellant has indeed provided.

[5] Learned counsel for the appellant's contention was related to non-adherence to '*Alcontara* direction' as well as the miscarriage of justice which had occurred when learned trial judge did not believe that there are two airports in Delhi under the name of Indira Gandhi Airport. One is the International Airport and the other is the domestic airport. It will take some reasonable time to travel to both airports by car and it is not one which is in the same building.

'*Alcontara* direction'

[6] The learned trial judge had at the prosecution stage acquitted and discharged the accused. Subsequently, on appeal the Court of Appeal had called for the defence. The learned trial judge had written two judgments both for the prosecution stage as well as for the trial end. Both judgments are comprehensive and discuses the facts and law in a coherent manner. We have no issue with the judgment save to say that the defence story was not rebutted by the prosecution when they have good opportunity to do so and the issue of airport could have also been checked by the prosecution and need not be rejected purely on speculation and surmise. For example, KLIA and KLIA2 appear to be the same but one has to travel to a distance to reach the same.

[7] In the instant case, learned counsel for the appellant had in fact travelled to Delhi and has placed it on record that there was a distance to meet. The prosecution should have verified and led evidence as the learned trial judge had rejected the appellant's evidence on the issue and to our mind it is crucial to appreciate the consistency of the appellant's story more so when he has from the start disclaimed knowledge and there were other exhibits to corroborate his evidence on the face of record to show that three parties have purchased the TV set in question and given to him at the Delhi Airport.

BRIEF FACTS

[8] The appellant, an Indian national, had arrived by flight from Delhi to Kuala Lumpur on 16 March 2009. On 17 March 2009 he had arrived in Kuching Airport. The custom officer having observed that he had taken a box from the conveyor belt proceeded to examine the box. A TV set was found and it was not functioning and upon further examination they found drugs cleverly concealed.

[9] It was clearly the finding of the learned trial judge the appellant was cooperative to the custom officers in all aspect. That part of the judgment at the prosecution stage at p 196 of the appeal record reads as follows:

> The evidence in the accused's favour was, he was cooperative throughout — from the moment he was asked to bring the TV box to Mohammed bin Taini for inspection right up the examination by Stephen Pina and the handing over of all the exhibits and the accused to Misell ak Rondeng. All the relevant customs officers who gave evidence vouched for him in this respect — Mohamed bin Taini, Bidin bin Lotot, Petus Amin and Stephen Pina.

[10] The appellant's story was well documented by the learned trial judge from pp 259–265.

[11] In essence, the TV set was given by Gajamuddin at New Delhi Airport Terminal 2. The learned trial judge has captured that part of the evidence as follows:

> Relating to third trip he made, he said Gaja Muhdin and two other persons with him helped in checking in the box at Terminal 2 of Indira Ghandi International Airport. He was told, he said by Gaja Muhdin that a person will come to collect the box from him in Kuching and this same person will arrange for a job for him. He was given the bill for the wrapping service (exh P44) and a purchase bill (exh P29) for the television. According to him he had every intention to declare the box to the customs officer upon his arrival but they pre-empted him by approaching him and bringing him and the box to the examination room.

[12] On this part of the crucial evidence learned counsel for the appellant says the truth or falsification of the defence case can easily be verified by the prosecution by seeking assistance from CCTV recording from the New Delhi, and as Indian national, are involved the Indian Government or Interpol will be pleased to nab the criminals involved. In addition, the prosecution had access to the handphone of the appellant and the calls can be traced or verified but nothing was done.

[13] We had read the petition of appeal, the appeal records and submissions of learned counsel of the learned deputy public prosecutor. After much

consideration to the submissions of the learned deputy public prosecutor, we take the view that the appeal should be allowed. Our reasons, inter alia, are as follows:

(a) it is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24 (SC); *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328);

(b) the issues raised in this case is related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe;

(c) in the instant case, the defence version though put to the prosecution at the earliest opportunity was not rebutted or verified by the prosecution even though they had ample opportunity to do so (see pp 218–226). Even the investigation officer recommendation to verify was turned down by superior officers from the head office. The failure to verify and/or rebut the defence story will amount to breach of '*Alcontara* direction' asserted by the Federal Court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, where His Lordship Edgar Joseph Jr FCJ had this to say:

> To resume our discussion regarding the important point of misdirection as regard the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed,

(d) it is now well settled that the hallmark in writing judgments necessarily requires the court to consider the defence version in the right perspective and make sure '*Alcontara* direction' as well as *Radhi's direction* are

meticulously dealt with, failing which the appellate court may rule that it is not safe to convict.

[14] In the instant case, we are satisfied that prosecution had not taken the initiative to rebut the defence story and in consequence it is unsafe to convict.

[15] For reasons stated above, the appeal is allowed and the conviction and sentence is set aside. The appellant is acquitted and discharged.

[16] We hereby order so.

Appeal allowed and conviction and sentence set aside.

Reported by Afiq Mohamad Noor